

>> MAY IT PLEASE THE COURT, I'M  
JOEL IRWIN FOR PLAINTIFF  
PETITIONER VALLADARES WHO WAS  
NOT ARRESTED AND NOT PROSECUTED  
AND THEREFORE HAD NO CLAIM FOR  
FALSE ARREST OR MALICIOUS  
PROSECUTION.

IN THE PERCORN CASE THERE WAS  
ARREST.

THE COURT CONSIDERED ELEMENTS OF  
FALSE ARREST OR MALICIOUS  
PROSECUTION.

IN FACT ONLY ONE ELEMENT, THAT  
WAS THE QUESTION OF INSTIGATION  
FOR DIRECT PROCUREMENT.

IN THAT CONTEXT THE COURT  
ESTABLISHED CRITERIA FOR SUCH  
CAUSE OF ACTION.

IF I REFER TO SOME OF THE THINGS  
THAT THE COURT SAID.

TALKED ABOUT WHAT HAPPENED WHEN  
THE PLAINTIFF HAD BEEN DETAINED  
OR PROSECUTION INSTIGATED OR AN  
ARREST AFFECTED.

IT SAID AN HONEST GOOD FAITH  
MISTAKE IN REPORTING THE  
INCIDENT DOES NOT MAKE HIM  
LIABLE FOR THOSE TWO OFFENSES.  
AS LONG AS EMPLOYEES ACTED  
REASONABLY, THEIR ACTIONS DID  
NOT CONSTITUTE DIRECT  
PROCUREMENT.

TALKING ABOUT THE PROCUREMENT  
ELEMENT.

IT SAID THAT AN HONEST, GOOD  
FAITH ACTED REASONABLY.

HONEST, GOOD FAITH UNIVERSITY IN  
REPORTING AN INCIDENT, CAN'T BE  
HELD LIABLE BASED ON FALSE  
IMPRISONMENT OR MALICIOUS  
PROSECUTION IF IT APPEARS,  
UNLESS IT FURTHER APPEARS THAT  
THE DEFENDANT WAS PERSONALLY  
INVOLVED.

>> WAS THE JURY HERE GIVEN AN  
INSTRUCTION THAT PARALLELS WHAT  
YOU'VE BEEN READING ABOUT, GOOD  
FAITH?

>> NO.

>> WAS IT REQUESTED BY THE  
DEFENDANT?

>> NOT AN ACCURATE INSTRUCTION.  
AS WE POINTED OUT IN THE REPLY  
BRIEF, THE INSTRUCTION THAT WAS  
VERBALLY PROPOSED DID NOT SAY

THAT THE BANK COULD NOT BE  
LIABLE FOR NEGLIGENCE IF IT MADE  
A GOOD FAITH MISTAKE WHICH WAS  
CHARACTERIZATION PRESENTED IN  
THE ANSWER BRIEF BUT IT SAID,  
QUOTE, NOT BE HELD LIABLE WHEN  
ITS EMPLOYEES MAY HAVE, AND HE  
MADE AN HONEST, GOOD FAITH  
MISTAKE.

UNLESS INSTRUCTION IMPOSED IS  
INACCURATE ONE, ISSUE OF ITS  
PROPRIETY IS NOT RESERVED FOR  
APPELLATE REVIEW.

NUMBER TWO, IN THIS PARTICULAR  
CASE SINCE I'M ON SUBJECT OF  
THIS CASE AS OPPOSED TO THE  
GENERAL CONFLICT.

IN THIS PARTICULAR CASE THE JURY  
WAS INSTRUCTED ON THE ISSUE OF  
PUNITIVE DAMAGES AND THE ISSUE  
OF PUNITIVE DAMAGES IS ENTIRELY  
INCONSISTENT WITH ANY CLAIM OF  
GOOD FAITH.

IN FACT--

>> HERE'S WHERE YOU RUN INTO  
PROBLEMS.

HERE IS WHERE YOU RUN INTO  
PROBLEMS WITH THAT SEPARATE AND  
APART FROM YOUR CAUSE OF ACTION.  
THAT THE MOTION TO AMEND, TO ADD  
PUNITIVE DAMAGES, AS WE MUST DO  
UNDER THE STATUTES, WAS LIMITED  
TO THE BATTERY, AND, THE OTHER  
ELEMENT, THE OTHER INTENTIONAL  
TORT, CORRECT?

>> TWO POINTS.

>> I MEAN IS THAT CORRECT?

>> THAT'S CORRECT.

>> THEY DID NOT SEEK PUNITIVE  
DAMAGES ON THE NEGLIGENCE CLAIM.

>> WELL THEY GENERALLY ARGUED  
THE RIGHT TO PUNITIVE DAMAGES IN  
GENERAL.

AND, THEY PROPOSED A JURY  
INSTRUCTION WHICH DID NOT  
DISTINGUISH BETWEEN THE COUNTS.  
AND SIMPLY SAID--

>> THAT I UNDERSTAND.

LET'S GO BACK TO OUR PLEADINGS.

>> YES.

>> OUR PLEADINGS IS THERE IS  
FREE-STANDING NEGLIGENCE COUNT  
TO WHICH THE AMENDMENT DID NOT  
APPLY?

>> CORRECT.

>> SO THEN WE GET TO TRIAL.  
AND THEN STUFF REALLY GOES CRAZY  
AT TRIAL.  
AND WE HAVE, AN INCONSISTENT  
VERDICT IS COMING BACK.  
AND WE'VE GOT ISSUES WITH REGARD  
WHETHER FINDING OF PUNITIVE  
CONDUCT APPLIES TO THE  
NEGLIGENCE OR DOES IT APPLY ONLY  
TO THE INTENTIONAL COUNTS?  
>> CORRECT.  
>> AND THE PROBLEM WE MUST  
RESOLVE HERE NOW, IS, WHETHER  
THAT FINDING, NUMBER ONE, IS  
CORRECT AS YOU ASSERT.  
BUT WE MUST ADDRESS WHETHER A  
NEGLIGENCE COUNT, A SIMPLE  
NEGLIGENCE, CAN STATE A CAUSE OF  
ACTION FOR THE SIMPLE MISTAKE AS  
REFLECTED IN THE MALICIOUS  
PROSECUTION, FALSE ARREST CASES,  
OR, DOES IT REQUIRE SOMETHING  
MORE SUCH AS, DID NOT, DID NOT  
CALL OFF LAW ENFORCEMENT AFTER  
HAVING KNOWLEDGE THAT THE, THE  
CHECK AND THE DRIVER'S LICENSE,  
ALL OF THAT?  
I SEE THAT AS TWO DIFFERENT--  
>> TWO POINTS.  
>> RIGHT.  
>> RIGHT.  
>> WE TOUCHED ON A LOT OF --  
>> REMEMBER THAT THE COURSE OF  
THE TRIAL SUPERSEDES THE  
PLEADINGS, AND IN THIS CASE THE  
PARTIES AGREED TO A VERDICT FORM  
WHICH ASKS THE JURY IN GENERAL  
WHETHER THERE WAS PUNITIVE  
CONDUCT, THEREBY AWARDED A  
PUNITIVE AWARD.  
WHEN THAT VERDICT CAME BACK,  
COUNSEL STOOD UP AND SAID, YOUR  
HONOR, I THINK WE'VE GOT AN  
INCONSISTENT VERDICT HERE.  
>> NOW, LET'S BE CLEAR, THAT  
PUNITIVE FINDING WAS NOT IN ANY  
WAY LIMITED TO THE TWO  
INTENTIONAL COUNTS?  
>> EXACTLY.  
>> OKAY.  
BECAUSE ON THOSE TWO COUNTS THE  
JURY FOUND IN FAVOR OF THE  
DEFENDANT.  
>> EXACTLY.  
>> CORRECT?

OKAY.

>> AND THE DEFENDANT STOOD UP  
AND SAID SINCE THERE WAS AN  
EXONERATION OF THOSE TWO COUNTS  
AND PUNITIVES ONLY ON THE  
NEGLIGENCE COUNT, I THINK  
THERE'S AN INCONSISTENT VERDICT  
HERE.

>> RIGHT.

>> AND THE JUDGE SAID WHAT DO  
YOU WANT ME TO DO, AND HE  
CONFERRED, AND HE GOT UP AND HE  
SAID I DON'T WANT IT.

>> DEFENSE SAID I DON'T WANT  
ANYTHING FROM YOU.

>> I DON'T WANT IT.

I WAIVE-- I WITHDRAW, I RETRACT  
THE ARGUMENT.

I DON'T WANT THE JURY  
REINSTRUCTED.

I REMOVE MY ARGUMENT ON THE  
BASIS OF AN INCONSISTENT  
VERDICT.

SO WE HAVE A PUNITIVE FINDING  
THAT, RESPECTFULLY, HERE RECORDS  
WHAT IS SAID TO BE THE GOOD  
FAITH DEFENSE.

DISTRICT COURT CALLS IT  
PRIVILEGE WHICH IS A DEFENSE,  
BUT REGARDLESS, WE HAVE A  
PUNITIVE FINDING IN WHICH WE  
UNDERTOOK THE BURDEN OF PROOF  
AND WHICH THE DISTRICT COURT  
CHARACTERIZES AS AN OFFENSE, THE  
MALICIOUS PROSECUTION, ETC.,  
RUBRIC WHICH IS ALL THAT THIS  
COURT TALKED ABOUT.

IF THE REPORTER ACTS  
MALICIOUSLY, MEANING THAT THE  
REPORTER EITHER KNOWS THE REPORT  
IS FALSE OR RECKLESSLY  
DISREGARDS WHETHER THE REPORT IS  
FALSE WHICH IS EXACTLY THE  
INSTRUCTION THE JURY WAS GIVEN  
ON THE PUNITIVE DAMAGE CLAIM.

SO IF THAT IS AN ELEMENT AS YOUR  
HONOR ASKS, THEN ANY OMISSION IN  
GIVING THE INCORRECT INSTRUCTION  
THAT WAS PROPOSED WHICH  
ESSENTIALLY TOLD THE JURY WHAT  
TO DO, NOT WHAT THEY SHOULD  
DECIDE, HAD TO BE HARMLESS UNDER  
CASES WE CITED SAYING THAT IF  
THERE'S SOME OMISSION IN ONE  
COUNT THAT'S CORRECTED IN THE

FINDING ON ANOTHER COUNT, THEN IT'S A HARMLESS ERROR. IT HAD TO BE CORRECTED BECAUSE THE JURY MADE A FINDING HERE THAT THERE WAS MALICIOUS, RECKLESS CONDUCT WHICH NEGATES ANY CLAIM OF GOOD FAITH WHICH WAS NOT PROPERLY PRESENTED IN THE FIRST PLACE BECAUSE THE INSTRUCTION THAT WAS PROPOSED WAS INVALID.

SO--

>> CAN WE JUST GO, AND WHAT OFTEN HAPPENS WITH US WE'RE UP HERE TRYING TO DECIDE AN ISSUE OF LAW, AND THEN WE'VE GOT IN THE GENERIC A SCREWED-UP VERDICT, TRIAL, WHATEVER. OKAY.

SO LET'S GO TO THIS ISSUE. THEY PLED A COUNT FOR NEGLIGENCE SEPARATE FROM THAT INTENTIONAL TORT.

THEY OBVIOUSLY COULDN'T PLEAD, AS IN PEKORNEY, A COUNT FOR FALSE ARREST OR MALICIOUS PROSECUTION, RIGHT?

SO NOW WE HAVE THE ONLY TORT NEGLIGENCE, THE QUESTION IS CAN THERE BE A CAUSE OF ACTION FOR NEGLIGENCE IN REPORTING A CRIME, OR DOES IT HAVE TO BE FOR GROSS NEGLIGENCE WHICH IS WHAT YOU'RE-- IF I'M HEARING YOU, IT SOUNDS LIKE, WELL, THAT'S WHAT THE JURY FOUND.

IN OTHER WORDS, IF SOMEBODY IN GOOD FAITH REPORTS A CRIME AND THAT, YOU KNOW, EVEN IF THEY COULD HAVE DONE SOMETHING MORE, THAT'S NOT-- WE'RE NOT GOING TO ALLOW THAT COUNT FOR NEGLIGENCE. BUT, HOWEVER, IF THEY, IF THE PLAINTIFF SHOWS THAT THEY DIDN'T ACT IN GOOD FAITH AND THEY ACTED IN RECKLESS DISREGARD FOR THE SUSPECT'S RIGHTS, AND HERE YOU HAVE EVEN SOMETHING MORE AS JUSTICE LEWIS SAID, THEN THAT IS A CAUSE OF ACTION.

BUT IT HAS TO BE-- IT'S UNDER NEGLIGENCE, IT'S NOT UNDER-- >> HAS TO BE.

>> OKAY.

SO PEKORNEY DIDN'T DEAL WITH--

>> THAT'S CORRECT.

>> IT DOESN'T SAY THAT'S CONCLUDED, THE CASE FROM THE FIRST COURT WHICH WAS DISAGREED WITH CERTAINLY HAD ELEMENTS WAY BEYOND JUST BEING CARELESS. THEY ESSENTIALLY LED THAT WOMAN INTO THE, YOU KNOW, SAID, SURE, YOU CAN TAKE THIS MONEY OUT. YOU CAN KEEP ON TAKING IT OUT. AND THEN HE TAKES IT OUT, AND THEN SHE GETS PROSECUTED-- NOT PROSECUTED, DID SHE GET PROSECUTED OR ARRESTED?

>> WELL, THE HARRIS-- AND AGAIN, YOU MADE A LOT OF POINTS, YOUR HONOR.

>> I GUESS LET'S JUST TAKE THE EASY POINT. SHOULD THERE BE A CAUSE OF ACTION FOR NEGLIGENCE, SIMPLE NEGLIGENCE AND A FAILURE TO-- A NEGLIGENT FAILURE, A NEGLIGENT REPORTING OF A CRIME?

>> YES.

EVEN IF IT IS SUBJECT TO SOME KIND OF PRIVILEGE OR REBUTTAL FOR GOOD FAITH MISTAKE. EVEN PEKORNEY TALKED ABOUT REASONABLENESS ON THE ONE HAND VERSUS GOOD FAITH ON THE OTHER. THERE HAS TO BE BECAUSE, AS YOUR HONOR SAYS, THAT'S ALL YOU'VE GOT SHORT OF PROSECUTION OR ARREST.

>> WELL, NOW, WAIT, WAIT, WAIT. THAT'S NOT NECESSARILY TRUE. I MEAN, EVERYTHING IS THE SAME EXCEPT THERE'S NOT A PROSECUTION OR AN ARREST. AND IT SEEMS TO ME THAT WHAT THE PUBLIC POLICY OF THE STATE AS ANNOUNCED IN THE PEKORNEY CASE IS THAT WE NEED TO HAVE THE REPORTING, INNOCENT REPORTING TO LAW ENFORCEMENT, OF CRIMINAL CONDUCT.

>> CORRECT.

>> BUT-- NOW, OKAY, AT THAT POINT.

BUT IT IS ONLY AFTER YOU GO BEYOND THAT INNOCENT REPORTING OR THE REPORTING OF IT-- AND IN THIS CASE IT'S SPECIFICALLY ALLEGED THAT AFTER IT WAS

REPORTED THAT THEY KNEW OR SHOULD HAVE KNOWN THAT THEY HAD THE WRONG PERSON.

IT'S LIKE WE HAVE A REPORT THAT THERE'S, I MEAN, AN EXTREME EXAMPLE OF A CAUCASIAN SUSPECT, BUT THEN SOMEONE OF A DIFFERENT RACIAL COMPOSURE COMES INTO THE BANK, AND THEY PUT 'EM ON THE FLOOR AND KICK 'EM IN THE HEAD. SO THAT'S WHAT WE'RE DEALING WITH.

SO I'M WONDERING OUT LOUD WHETHER WE REALLY NEED TO GO TO SAYING GOOD FAITH REPORTING CAN BE A TORT, OR DOES IT TAKE PLUS SOMETHING?

IT NEEDS MORE THAN JUST SIMPLE NEGLIGENCE IN REPORTING TO FOLLOW GOOD PUBLIC POLICY FOR THE STATE.

>> I THINK ON THE ASSUMPTION THAT IT DOES, AND I'LL ACCEPT THAT ASSUMPTION FOR THE MOMENT, IT STILL IS NOT, IT'S STILL A NEGLIGENCE CASE.

>> RIGHT.

>> AND THAT'S ALL YOU'VE GOT WHEN YOU DON'T HAVE AN ARREST OR A PROSECUTION.

AND WE HAVE OUR COURT SAYING, NO, YOU DON'T HAVE A NEGLIGENCE CASE.

WE HAVE THE FIRST DISTRICT SAYING, YES, YOU DO IN SPECIFIC DISCUSSION OF THE NEGLIGENCE COUNT.

IT SAYS THERE'S SOMETHING HERE MORE THAN AN INNOCENT MISUNDERSTANDING.

WE HAVE AN EVIDENTIARY PRECEDENT FOR A NEGLIGENCE CLAIM.

AND SO THE FINDING OF OUR COURT IN VALLADARES THAT THERE IS NOT A CLAIM FOR NEGLIGENCE AND THAT HARRIS IS INCONSISTENT, A CERTIFICATION OF CONFLICT, SEEMS TO ME TO BE ERRONEOUS EVEN IF I ACCEPT YOUR PREMISE THAT YOU'VE GOT TO PROVE SOMETHING MORE.

>> WELL, I DON'T DISAGREE, BUT WE HAVE TO GET IT RIGHT.

AND I DON'T THINK WE OUGHT TO BE STRIKING OUT ON AN ENTIRE NEW ARM OF THE LAW IF IT'S

INCONSISTENT WITH OUR CURRENT  
JURISPRUDENCE AND WHERE THE LAW  
OUGHT TO BE.

>> I AGREE.

AND I'M NOT GOING TO BE, I'M NOT  
GOING TO TRY TO BE DISINGENUOUS  
OR INTELLECTUALLY DISHONEST.

I THINK YOU'RE RIGHT.

I THINK BASED UPON THOSE TWO  
POLICIES THERE'S NOT MUCH OF A  
BASIS FOR DISTINGUISHING BETWEEN  
INSTIGATING A POLICE ACTION THAT  
RESULTS IN SOMEBODY BEING  
INJURED BUT NOT ARRESTED AND  
PROSECUTED--

>> RIGHT.

>>-- AND INSTIGATING A POLICE  
ACTION.

THAT DOES.

>> SO WE'RE LOOKING AT THE PLUS  
OR WHAT'S ABOVE AND BEYOND THAT.

>> EXACTLY.

I'M NOT GOING TO ADVOCATE  
OTHERWISE, BECAUSE I CAN'T  
DEFEND IT.

WHAT I'M SAYING IS THAT IN THIS  
PARTICULAR CASE THEY DID NOT  
PROPOSE AN ACCURATE INSTRUCTION  
TO THAT EFFECT.

IT WAS, IT PRESUMED WHAT THEY'RE  
TRYING TO ASK A JURY TO DECIDE.  
IT WAS ORALLY PROPOSED, IT WAS  
WRONG.

SO THAT ISSUE IS NOT HERE IN  
THIS CASE.

AND NUMBER TWO, IF IT WERE, THE  
FINDING OF PUNITIVE DAMAGES  
RENDERS ANY OMISSION IN THE, IN  
A FAILURE TO CHARGE ON THAT  
ISSUE UTTERLY HARMLESS.

>> WELL, THERE'S TWO DIFFERENT  
ISSUES HERE, TO ME.

I THINK THAT THE IDEA OF A  
QUALIFIED PRIVILEGE OF GOOD  
FAITH DOES TRANSLATE INTO A  
PLAINTIFF HAVING TO DISPROVE--  
>> OKAY.

>>-- THAT THE-- AND I'VE  
LOOKED AT IT IN OTHER CASES  
ABOUT WHAT PRIVILEGE MEANS.

>> OKAY.

>> THE PLAINTIFF'S BURDEN TO  
PROVE THAT THEY DID NOT ACT IN  
GOOD FAITH.

THEN THE QUESTION IS, IS THE



FINDING OF MALICE WHICH ALMOST MEANS I'M OUT TO GET YOU, OR CAN IT BE IS IT THE HIGHER STANDARD NOT JUST OF, YOU KNOW, BECAUSE SHE'S IN A PANIC, OBVIOUSLY. THIS IS AN UNTRAINED PERSON THAT PANICKED AND DIDN'T SEE WHAT WAS RIGHT IN FRONT OF HER. SHE DIDN'T ACT MALICIOUSLY. BUT I THINK WHAT THE JURY MUST HAVE FOUND FROM ALL THE EVIDENCE IS THAT IT WAS REALLY OUTRAGEOUS BASED ON THE BANK'S POLICIES WHAT-- FOR THIS TO HAPPEN IN THE FIRST PLACE. AND IT IS A BANK, NOT JUST SOMEBODY THINKING THEY'RE WITNESSING A CRIME. SO IS THE STANDARD, PEKORNEY, WHICH I THINK YOU'RE SAYING WOULD BE APPLICABLE TO A NEGLIGENCE ACTION--

>> I THINK SO.

>>-- IS IT SIMPLY THAT THEY, IF THE JURY FINDS THAT SHE ACTED IN GOOD FAITH AND WITHOUT MALICE, IS THAT THEN A COMPLETE DEFENSE?

>> NO, BECAUSE THERE WAS ALSO A FINDING OF RECKLESSNESS AT THE COURTROOM LEVEL. AND IT WAS OUTRAGEOUS.

>> SO THEN, AGAIN, GOING FORWARD IS THAT, IS THE HOLDING THAT NOT JUST THAT THEY FIND A LACK OF GOOD FAITH, BUT BACK TO WHAT JUSTICE LEWIS IS-- I THINK, MAY OR MAY NOT BE ON THE SAME PAGE-- SOMETHING MORE OF CONDUCT THAT RISES TO THE LEVEL, ESSENTIALLY, OF PUNITIVE DAMAGES?

>> RESPECTFULLY, YOUR HONOR, THERE'S NO DISTINCTION.

>> WELL, THERE IS A PRETTY BIG-- NO, NO. THERE IS A BIG DISTINCTION IN SAYING, LISTEN, I ACTED IN GOOD FAITH, BUT I STILL WAS RECKLESS. I WAS RECKLESS BECAUSE I SIMPLY PANICKED. I DIDN'T SEE THE GUY WAS-- GAVE ME A CHECK, AND THE CHECK WAS VALID ON A BANK OF AMERICA-- I JUST, I COMPLETELY WENT SORT OF JUST, I WAS ON ONE MODE.

THAT DOESN'T MEAN SHE ACTED  
MALICIOUSLY, DOES IT?

>> IT DOESN'T.

IT DOESN'T MEAN SHE ACTED IN  
GOOD FAITH.

AND IT CERTAINLY DOESN'T MEAN  
THAT THE CORPORATE OFFICERS HERE  
WHO PRESCRIBED THESE POLICIES,  
WHICH ARE AN OUTRAGE, ACTED IN  
GOOD FAITH.

>> WELL, NO.

THE QUESTION COMES BACK TO AND  
THE PHILOSOPHICAL DISCUSSION,  
DOES THAT PLUS THAT WE'RE  
TALKING ABOUT HAVE TO BE UP TO  
THE LEVEL OF MALICIOUSNESS OR  
SOMETHING BEYOND THE INNOCENT  
REPORTING?

I.E., YOU HAVE THE FACTS THERE,  
YOU'VE GOT AN OFFICER, YOU  
GOT-- AND WHETHER THAT'S  
MALICIOUS OR NOT, IS THAT  
CONSIDERED AN ACTION ABLE TORT?  
SO THERE IS A DISTINCTION AS TO  
THE ELEMENT OF PROOF OF WHAT  
THAT PLUS OR WHAT THAT  
SUBSEQUENT ACTION IS.

ARE WE-- AM I COMMUNICATING THE  
QUESTION?

>> I BELIEVE SO.

AND THE PLUS THAT THE COURT  
TALKED ABOUT IN PEKORNEY--

>> WELL, PEKORNEY'S NOT THE  
NEGLIGENCE CASE.

>> WELL, I'M ACCEPTING YOUR  
PREMISE THAT THE JUXTAPOSITION  
BASED ON THE UNDERLYING POLICIES  
IS ANALOGOUS IN A NEGLIGENCE  
CASE.

>> WELL, AGAIN, DOES THAT  
REQUIRE MALICIOUSNESS OR JUST  
SOME ACT BEYOND GOOD FAITH  
REPORTING?

THAT'S WHAT I THINK MY DIRECT  
QUESTION IS.

>> I THINK I'VE GOT TO TRANSPOSE  
WHAT PEKORNEY SAYS, AND THAT'S  
REASONABLENESS ON THE ONE HAND,  
WHICH IS THIS COURT'S LANGUAGE,  
AND BAD FAITH ON THE OTHER.

>> OKAY.

SO YOU'RE SAYING--

>> GOOD FAITH ON THE OTHER.

>>-- JUST A DIFFERENT ACT OF  
NEGLIGENCE BEYOND REPORTING IS

NOT SUFFICIENT, THAT IT REQUIRES CONDUCT THAT WOULD OTHERWISE IN ANY CONTEXT BE DETERMINED TO BE BAD FAITH MALICIOUSNESS TO SATISFY PUNITIVE DAMAGES.

>> CORRECT.

AND PUNITIVE DAMAGES IS CHARACTERIZED BY MALICE, IT'S CHARACTERIZED BY RECKLESS DISREGARD.

THE FINDING HERE OF MISCONDUCT AND RECKLESSNESS AT THE CORPORATE LEVEL DEALS WITH INTENTIONAL CONDUCT AND A PROPER INSTRUCTION WAS NOT PROPOSED.

>> NOW, BEFORE YOU GO A LOT FURTHER, WE'VE GOT THE INCONSISTENCY IN THE VERDICT. THE ONLY RELIEF I CAN SEE HERE IS YOU HAVE TO SEND IT BACK TO--

>> NOT IF IT'S WAIVED.

IF AN INCONSISTENT VERDICT IS WAIVED, THEN-- IT WAS RAISED AND THEN THEY SAID I DON'T WANT IT.

NOW, THAT'S NOT A NEW TRIAL. THAT'S TAKING THE VERDICT IN MY FAVOR AND SEEING WHETHER IT SUPPORTS THE JUDGMENT.

BECAUSE THE INCONSISTENCY HAS BEEN WAIVED.

THE CASE LAW IS VERY CLEAR ON THAT, YOUR HONOR.

YOU DON'T RETRY IT.

YOU TAKE THE EVIDENCE AND THE FINDING IN THE LIGHT MOST FAVORABLE TO ME NOTWITHSTANDING ANY INCONSISTENCY WHICH THE OTHER SIDE WAIVED.

SO EVEN IF EVERYTHING WE'VE BEEN TALKING ABOUT HERE WERE CORRECT, IN THIS PARTICULAR CASE ANY SUCH CONTENTION REGARDING OUR DISCUSSION, JUSTICE PARIENTE, ABOUT DISTINCTION OR THE POTENTIAL DISTINCTION BETWEEN GOOD FAITH ON THE ONE HAND AND RECKLESSNESS ON THE OTHER BECOMES IRRELEVANT, AND IN THIS PARTICULAR CASE THE PUNITIVE FINDING IS RESPECTFULLY ANALOGOUS TO WHAT'S BEING REQUIRED.

AND ON TOP OF ALL THAT, ANY

OBJECTION BASED ON ANY  
INCONSISTENCY BETWEEN THE  
PUNITIVE FINDING AND THE  
PRESUMED REQUIREMENT OF GOOD  
FAITH HAS BEEN ABSOLUTELY WAIVED  
EXPLICITLY AND CONSCIOUSLY ON  
THE RECORD.

THEREFORE, RESPECTFULLY, THE  
ORDER OF THE DISTRICT COURT  
SHOULD BE REVERSED, AND THE  
CAUSE REMANDED FOR FURTHER  
PROCEEDINGS, AND--

>> WELL, THAT'S ENTRY OF  
JUDGMENT THEN, IS WHAT YOU'RE  
SAYING.

>> YES, YOUR HONOR.

>> OKAY.

>> YEAH.

THE JURY FINDING SHOULD BE  
AFFIRMED.

>> MAY IT PLEASE THE COURTS, I'M  
RANDY LIEBLER REPRESENTING BANK  
OF AMERICA.

BEFORE I GO ON, LET ME JUST  
ADDRESS A FEW THINGS THAT WERE  
TOUCHED ON.

THE FIRST IS THAT THE JURY  
INSTRUCTION THAT WAS GIVEN IS  
CLEARLY LIMITED TO THE GROUNDS  
OF FALSE IMPRISONMENT AND  
BATTERY.

IT DOES NOT INSTRUCT ON GROSS  
NEGLIGENCE.

MOREOVER, AS WAS RAISED IN THE  
THIRD DISTRICT COURT OF APPEALS,  
THE INSTRUCTION REQUIRED BY THE  
STATUTE FOR LIABILITY FOR  
EMPLOYEE CONDUCT WAS NOT GIVEN.

>> CAN I ASK YOU THIS QUESTION  
ON THE JURY VERDICT, BECAUSE I  
DON'T HAVE IT IN FRONT OF ME.  
DID-- IT SAYS DO YOU FIND  
NEGLIGENCE, AND THEY SAID, YES.

>> YES.

>> DO YOU FIND BATTERY, THEY  
SAID, NO.

>> CORRECT.

>> DO YOU FIND-- WHAT WAS THE  
OTHER?

>> FALSE IMPRISONMENT, WHICH IS  
THE PEKORNEY.

>> THEY SAID, NO.

DID IT THEN GO TO-- HOW DID THE  
PUNITIVE DAMAGES INTERROGATORY  
READ?

>> I BELIEVE IT CAME RIGHT AFTER  
THE DAMAGE--

>> AFTER THE REGULAR-- DO YOU  
AWARD DAMAGES IF YOU FOUND FOR  
EITHER ONE, TWO OR THREE WHAT  
ARE THE DAMAGES?

>> CORRECT.

>> OKAY.

AND IT GOT TO PUNITIVE DAMAGES,  
DID IT SAY ONLY ANSWER THIS  
QUESTION IF YOU ANSWERED YES ON  
TWO AND THREE?

>> I DON'T THINK THAT IT SAID  
THAT.

>> AND ISN'T-- I MEAN, WE--  
ISN'T THAT THE PROBLEM?  
AND THEN, WHICH IS THAT THE  
DEFENSE SHOULD HAVE ASKED FOR  
THE SPECIAL INTERROGATORY TO BE  
CLEAR FOLLOWING THE INSTRUCTIONS  
THAT SAID IF YOU ANSWER NO, I  
MEAN, I'M ASSUMING TWO AND THREE  
WERE THE INTENTIONAL TORTS.  
YOU KNOW, ONE NEGLIGENCE--

>> CORRECT.

>> YES.

THAT YOU DO NOT ANSWER PUNITIVE  
DAMAGES.

SO THAT WAS NUMBER ONE IF THAT  
VERDICT WAS NOT ASKED FOR.  
NUMBER TWO, THOUGH, WHEN THE  
DEFENSE LAWYER-- WAS THAT YOU?

>> NO, IT WAS NOT.

>> OKAY.

IT'S ALWAYS GOOD WHEN THAT  
HAPPENS.

[LAUGHTER]

>> IT WAS MY PARTNER.

>> WHEN THE DEFENSE LAWYER  
LOOKED AND SAID, WAIT A SECOND  
HERE, THEY FOUND NO ON THE  
INTENTIONAL TORTS, YES PUNITIVE  
DAMAGES, THE-- AT THAT POINT IF  
SOMETHING'S INCONSISTENT, WHAT  
DID THE DEFENSE LAWYER SAY?

>> WELL, WHAT WE RAISED WAS THAT  
THE CAUSE OF ACTION ON WHICH THE  
JURY FOUND THIS LIABLE  
NEGLIGENCE DOES NOT, AS A MATTER  
OF LAW, SUPPORT THE PUNITIVE  
DAMAGE AWARD.

>> BUT THE INCONSISTENCY, AND WE  
JUST HAD THIS RECENTLY, IT COULD  
BE THAT THEY INTENDED TO FIND  
FOR-- YOU DON'T REALLY KNOW

BECAUSE THEY FOUND PUNITIVE DAMAGES.  
SO MAYBE THEY FOUND ONE OF THOSE INTENTIONAL TORTS.  
>> WELL, AND WE-- I MEAN, ONE OF THE PROBLEMS IS THE INSTRUCTION ITSELF WAS DEFECTIVE, AS I MENTIONED.  
BUT IF THERE'S NO FINDING THAT, OF A CAUSE OF ACTION THAT WOULD SUPPORT THE PUNITIVE DAMAGES, THE PUNITIVE DAMAGES CANNOT STAND.  
>> SO YOU THOUGHT THAT YOU WOULD BE ABLE TO GET JUST AS A MATTER OF LAW THE PUNITIVE DAMAGES SET ASIDE?  
>> WE SHOULD, AND THAT'S OUR POSITION, THAT THAT SHOULD HAPPEN.  
NOW, AS FAR AS THE SORT OF THE BROADER CLAIM--  
>> SO THERE'S NO QUESTION IN YOUR MIND THAT IT WASN'T TRIED TO THE JURY AS GENERAL PUNITIVE DAMAGES, AS TO GROSS NEGLIGENCE--  
>> NO.  
IF--  
>> SO ALL THIS ISSUE OF THE CORPORATE DISREGARD ALL WAS GOING TO EITHER FALSE IMPRISONMENT OR BATTERY?  
>> CORRECT.  
AND THERE WAS NO MOTION TO AMEND TO CONFORM TO THE EVIDENCE TO INCLUDE GROSS NEGLIGENCE, AND THERE WAS NO GROSS NEGLIGENCE INSTRUCTION.  
AND AS MENTIONED, THE PUNITIVE DAMAGES INSTRUCTION WAS LIMITED TO THE BATTERY AND FALSE IMPRISONMENT.  
SO WHAT WE'RE DOING IS WE'RE USING THE DAMAGE AWARD, ESSENTIALLY, TO NULLIFY THE JURY'S VERDICT IN BANK OF AMERICA'S FAVOR.  
NOW, GOING BACK TO PEKORNEY AND THE QUESTION WHAT CAUSE OF ACTION EXISTS FOR THIS CONDUCT, AND I THINK THAT WHEN WE READ THE FULL FABRIC OF PEKORNEY, WE SEE THAT IT DOES ADDRESS THIS ISSUE.

>> THERE'S ONLY TWO CAUSES OF ACTION DISCUSSED IN THAT OPINION, ISN'T THERE?

>> WELL--

>> IS THAT CORRECT?

>> IN A SENSE IT ALSO ADDRESSES NEGLIGENCE, AND I'LL GET--

>> WELL, HOW CAN IT WHEN THE ONLY CAUSE OF ACTION PLED WERE MALICIOUS PROSECUTION AND FALSE ARREST?

>> WELL, WHAT WAS PLED IN THE COURT BELOW IN PEKORNEY IN FEDERAL COURT WAS A CLAIM FOR NEGLIGENCE, RECKLESSNESS--

>> WE'RE TALKING ABOUT THE DECISION OF THIS COURT.

>> RIGHT.

AND SO THEN IT CAME UP ON FIVE CERTIFIED QUESTIONS FROM THE 5TH, NOT THE 11TH.

THE FIFTH QUESTION RELATED TO THE QUESTION OF REASONABLENESS. AND IT'S THAT QUESTION THAT IF THE COURT HAD INTENDED TO CREATE A CAUSE OF ACTION FOR NEGLIGENCE, WHICH HAD BEEN PLED, THE COURT COULD HAVE DONE SO. BUT THE COURT SAID WE RESPONDED TO THE FIRST TWO QUESTIONS BY ADDRESSING FALSE IMPRISONMENT QUESTION.

AND SO WE DON'T EVEN NEED TO GET TO THE QUESTION THREE, FOUR AND FIVE.

AND FIVE IS THE QUESTION-- I HAVE THE LANGUAGE HERE.

BUT FIVE IS A QUESTION THAT ADDRESSED OR COULD HAVE ADDRESSED THE REASONABLENESS OR NEGLIGENCE ISSUE.

NOW, SO WHAT PEKORNEY SAID IS THAT IN THE CONTEXT OF A FALSE IMPRISONMENT CLAIM-- WHICH IS ONE OF THE CLAIMS PLED HERE-- THE PLAINTIFF HAS THE RIGHT TO PROVE BAD FAITH IN PROCUREMENT OF THE CAUSE OF ACTION.

AND THAT DOVETAILS VERY NICELY, I THINK, WITH WHAT'S BEEN DISCUSSED HERE.

IF THE PLAINTIFF HAD PLED AND REQUESTED A JURY INSTRUCTION WITH RESPECT TO THE FALSE IMPRISONMENT CLAIM ASKING

WHETHER THERE WAS BAD FAITH OR A LACK OF GOOD FAITH, HOWEVER YOU WANT TO FORMULATE IT, IN REPORTING THE SUSPECTED CRIME THEN THE JURY COULD FIND THAT THERE WAS PROCUREMENT, AND THERE WOULD BE LIABILITY FOR FALSE IMPRISONMENT.

>> I DON'T SEE IN THIS AS BEING IN THE REPORTING THE PROBLEM. IT SEEMS TO ME THE PROBLEM IS THE SECOND ALLEGATION, AND THAT IS AFTER KNOWING THAT THIS IS NOT THE RIGHT GUY, FAILING TO TELL LAW ENFORCEMENT, HEY, HOLD UP.

>> RIGHT.

AND I THINK THE TIMELINE--

>> THIS IS TWO DIFFERENT ACTIONS.

>> I THINK, I THINK THAT THEY'RE THE SAME, BUT JUST LET ME EXPLAIN WHY.

>> HOW CAN THEY BE THE SAME? BECAUSE I CAN SEE THAT THE LAW OUGHT TO BE THAT SOMEONE WHO REPORTS IT UNDER THE KNOWLEDGE THEY HAVE THAT THERE SHOULD BE SOME QUALIFIED IMMUNITY. HOWEVER, IF BEFORE EVERYTHING'S OVER THEY ARE THEN GIVEN THE INFORMATION, DRIVER'S LICENSE, CHECK, I'M IN THE BANK, I MEAN, I'M A CUSTOMER OF THE BANK, THAT GOES BEYOND JUST REPORTING, I THINK, THE ROBBERS HERE.

>> RIGHT.

NOW, THE TESTIMONY'S UNREFUTED THAT SUBJECTIVELY THE TELLER BELIEVED THAT THIS PERSON WAS THE ROBBER THROUGHOUT THE INCIDENT.

THE INCIDENT OCCURRED--

>> WELL, I MEAN, BUT THAT MAY BE JUST FABRICATED BELIEF.

THERE WAS NO ROBBERY NOTE HANDED.

>> WELL, NO, SHE BELIEVED THAT THIS PERSON WAS THE, WAS A ROBBER THAT HAD BEEN REPORTED TO HER IN A PICTURE EARLIER IN THE DAY.

>> WASN'T HE THERE 15 MINUTES?

>> EXCUSE ME?

>> THE WHOLE EVENT TOOK ABOUT 15



MINUTES.

>> YES.

SO THE TIMELINE IS THIS: 3:00  
MR. VALLADARES WALKS INTO THE  
BRANCH, 3:07 THE WILLED WAS SENT  
OUT, 3:15--

>> WELL, THEY KNOW LESS THAN  
SEVEN MINUTES BECAUSE IT FIRST  
GOES TO THE SECURITY AT THE  
BANK, RIGHT?

>> RIGHT.

>> SO WITHIN MINUTES OF THAT  
PERSON WALKING IN, I'M ALERTING  
POLICE I'M BEING ROBBED.  
SO THEN THAT PERSON WALKS OVER  
TO THE TELLER, SAYS, YOU KNOW,  
HELLO, HOW ARE YOU, AND HANDS  
THE DRIVER'S LICENSE AND CHECK,  
ISN'T THAT A DIFFERENT SCENARIO  
WHAT THEY DO AT THAT POINT THAN  
REPORTING?

>> RIGHT.

>> I MEAN, AS FAR AS THE  
JURISPRUDENCE OF THE STATE, I  
MEAN, WHEN YOU'RE LOOKING AT IT  
LOGICALLY.

THAT JUST DOESN'T MAKE ANY SENSE  
TO ME THAT YOU CAN, YOU KNOW, I  
THINK THAT'S THE ROBBER, AND  
THEN YOU'RE ABSOLUTELY HOME FREE  
AND JUST DISREGARD ANYTHING ELSE  
THAT HAPPENS WHETHER YOUR WIFE  
SHOWS THEM HER DRIVER'S LICENSE  
AND THE CHECK OR NOT.

>> RIGHT.

AND I THINK THAT IN THE CONTEXT  
OF THE PROCUREMENT THAT WOULD BE  
EVIDENCE.

IF WE'RE TALKING ABOUT--

>> IT'S ALREADY BEEN PROCURED  
BECAUSE THEY'RE ALREADY THERE.

>> RIGHT.

BUT IT'S A FABRIC OF A  
CIRCUMSTANCE.

>> YOU WOULD AGREE WITH JUSTICE  
LEWIS THAT THE BANK DID NOT  
IGNORE AND BE RESPONSIBLE FOR  
ITS SUBSEQUENT ACTIONS AFTER AN  
INITIAL PHONE CALL OR SOME TYPE  
OF REPORTING TO THE LAW  
ENFORCEMENT, RIGHT?

>> NOT AT ALL.

NOT AT ALL.

BUT WHAT I'M SAYING IS--

>> OKAY.

SO IF THE BANK IS RESPONSIBLE IN SOME WAY FOR ITS ACTIONS, THEN WHAT IS THE APPROPRIATE CAUSE OF ACTION?

>> WELL, I THINK IT WOULD BE BAD FAITH IN PROCURING, BECAUSE I THINK IT'S PART OF THE SAME CONDUCT.

>> SO YOU'RE VIEWING ALL OF THE ACTIONS AND THE SUBSEQUENT INFORMATION THAT THE BANK CAME BY AS PART OF THE REPORTING PROCESS.

>> SURE.

AS PART OF THE PROCUREMENT ISSUE.

BECAUSE IT'S NOT PROCURED THAT-- THE IMPRISONMENT IS NOT PROCURED UNTIL THE IMPRISONMENT OCCURS.

>> SO IF THE, IF THE BANK CAME TO INFORMATION THAT THEY JUST RECKLESSLY DISREGARDED OR THEY SOMEHOW BECAME GROSS NEGLIGENT IN SOME WAY, THEN THEY FALL OUTSIDE PROTECTION OF THIS PARTICULAR DEFENSE OR PRIVILEGE, WHATEVER YOU WANT TO CALL IT-->> CERTAINLY.

>>-- AND THEN THEY WOULD BE LIABLE--

>> IN A PROPERLY-PLED CLAIM FOR FALSE IMPRISONMENT WHERE THE PLAINTIFF ALLEGED--

>> YOU DON'T HAVE TO HAVE FALSE IMPRISONMENT.

WHAT IF THEY DON'T IMPRISON THE PERSON?

>> WELL, WHAT--

>> YOU CAN'T HAVE A NEGLIGENCE CLAIM?

>> I DON'T THINK SO.

>> WELL, OKAY.

FROM THAT VANTAGE POINT THEN.

>> THE IMPRISONMENT AND THE PHYSICAL VIOLENCE ARE, GO HAND IN HAND.

>> I THINK THE PROBLEM THOUGH, AND MAYBE THE JURY WAS HAVING IT, IS THAT THE INTENTIONAL NATURE OF FALSE IMPRISONMENT AND, OR BATTERY, THE BANK DID NOT DO THAT.

SO GROSS NEGLIGENCE SEEMS ESPECIALLY WHERE SOMEONE'S

INJURED BECAUSE THE OTHER CASES  
THEY'RE NOT INJURED SEEMS THE  
ABSOLUTELY APPROPRIATE WAY TO  
APPROACH THIS WITH GOOD FAITH  
BEING SOMETHING, A QUALIFIED  
PRIVILEGE THAT HAS TO BE  
OVERCOME BY THE PLAINTIFF AND  
THAT THE SOMETHING MORE IS  
THE --

>> SOMETHING MORE THAT WOULD  
SUPPORT A FINDING OF GROSS  
NEGLIGENCE SO THAT INNOCENT  
REPORTING, EVEN IF YOU, YOU  
KNOW, IF YOU'RE SOMEBODY THAT  
THOUGHT YOU SAW SOMEONE BEING  
ROBBED AND YOU CALLED IT IN,  
EVEN IF YOU DIDN'T HAVE YOUR  
GLASSES ON AND YOU SHOULD HAVE  
KNOWN BETTER IS NEVER GOING TO  
BE ACTIONABLE.  
BUT THIS IS NOT THAT SITUATION,  
NOR IS HARRIS.

>> RIGHT.

BUT I THINK IN THE RUSH TO  
ACHIEVE A CAUSE OF ACTION FOR  
NEGLIGENCE, A LOW STANDARD, THE  
PLAINTIFF NEGLECTED TO INCLUDE  
IN ITS INSTRUCTIONS IN ITS  
ALLEGATIONS ON FALSE  
IMPRISONMENT THE PEKORNEY  
LANGUAGE OF BAD FAITH--

>> WELL, THEY'RE SAYING THAT YOU  
DIDN'T PROPOSE A PROPER  
INSTRUCTION THAT THEY  
ACKNOWLEDGE YOU WOULD HAVE BEEN  
ENTITLED TO A PROPER  
INSTRUCTION, BUT THAT YOU  
DIDN'T, YOU DIDN'T PROPOSE ONE  
BECAUSE YOU ASSUMED THAT WHEN  
THEY ACTED IN GOOD FAITH RATHER  
THAN IF THEY ACT IN GOOD FAITH.  
SO WHAT DO YOU SAY ABOUT THAT,  
WHICH IS THEY'RE NOT SAYING YOU  
WEREN'T ENTITLED TO IT, JUST  
THAT A PROPER INSTRUCTION WASN'T  
GIVEN.

>> WELL, I THINK A FAIR READING  
OF THE RECORD IS THEY VEHEMENTLY  
OPPOSED ANY INSTRUCTION ON  
PEKORNEY OR GOOD FAITH, AND I  
THINK THE WORDS "WHEN" OR "IF"  
ARE SPLITTING IT TOO THIN.

>> IF WE WERE TO AGREE IN PART  
WITH YOU, DISAGREE IN PART AND  
BECAUSE THIS WHOLE THING LOOKS

SCREWED UP AND JUST SAY THIS SHOULD GO BACK FOR A NEW TRIAL WITH PROPER INSTRUCTIONS ON THE LAW, I ASSUME YOU WOULD OBJECT TO THAT BUT NOT AS VEHEMENTLY AS YOU'D OBJECT TO JUST UPHOLDING THE VERDICT.

>> OF COURSE, YOUR HONOR.

[LAUGHTER]

I'M SLOW, AND IT'S TAKEN ME SEVEN YEARS TO FIGURE OUT PEKORNEY, BUT I'M NOT--

[LAUGHTER]

>> DO YOU THINK HARRIS-- WOULD YOU-- DO YOU FEEL HARRIS WAS WRONGLY DECIDED?

>> I DO THINK IT WAS WRONGLY-- IT WAS DECIDED CORRECTLY ON THE FACTS, AND YOUR HONOR POINTED THAT OUT.

BUT I THINK IT WAS, IT UNNECESSARILY GRAFTED THE NEGLIGENCE CONCEPT.

>> SO YOU THINK THAT HARRIS SHOULD HAVE HAD TO PLEAD FALSE IMPRISONMENT?

>> I THINK IF THEY PLED FALSE IMPRISONMENT, THEY WOULD HAVE CLEARLY SUCCEEDED UNDER THOSE FACTS IF THEY PLEADED THERE WAS BAD FAITH.

OF COURSE THERE WAS BAD FAITH IN HARRIS UNDER THE ALLEGATIONS. IT WAS DECIDED ON A MOTION TO DISMISS.

>> BUT, AGAIN, THIS DISTINCTION BETWEEN INTENTIONAL TORTS AND NEGLIGENCE.

I MEAN, YOU KNOW, MAYBE AT ONE TIME IN OUR HISTORY ENCOUNTERS WITH LAW ENFORCEMENT-- AND GOD BLESS 'EM, WE KNOW THAT THEY FACE ALL KINDS OF THINGS TODAY AND HORRIFIC DANGERS AND VIOLENCE-- BUT IT HAS PROVOKED VIOLENT RESPONSES.

AND AN ENCOUNTER BY A CITIZEN SUCH AS MR. VALLADARES WITH LAW ENFORCEMENT DOES NOT HAVE KISS-YOU-ON-THE-CHEEK RAMIFICATIONS.

>> RIGHT, BUT UNDER--

>> AND SO TO SAY THAT OUR CITIZENS ARE NOT PROTECTED WHEN SOMEBODY JUST WILLY-NILLY, OH, I

SAW A PICTURE THIS MORNING, AND I'M GOING TO CALL IT IN, OKAY, IF THAT'S GOOD FAITH. BUT THEN YOU FIND OUT THAT'S NOT A ROBBER IN YOUR BANK, THAT'S ONE OF YOUR CUSTOMERS, AND YOU KNOW THAT BEFORE THEY'RE KICKED IN THE HEAD, THAT, TO ME, CRIES OUT FOR SOME REMEDY.

>> RIGHT--

>>-- OTHER THAN A FALSE ARREST.

>> BUT I THINK THAT IT MIGHT BE JUST THE CONCEPT OF THE IMPRISONMENT WHICH ALL IT REQUIRES IS-- FALSE IMPRISONMENT IS NOT NECESSARILY PUTTING SOMEONE IN PRISON, IT'S JUST DETAINING PHYSICALLY SOMEBODY OR PUTS YOUR HANDS, WHICH HAPPENED.

BUT PEKORNEY REALLY ACCOUNTS FOR THAT AND SAYS IF I REPORT AND I DON'T HAVE GOOD FAITH-- WHICH IS JUST HONESTY AND GOOD INTENTION INTENTIONS-- IF I DON'T HAVE THAT HONESTY AND GOOD INTENTIONS WHEN I REPORT, THEN I HAVE PROCURED THAT ARREST OR IMPRISONMENT, AND I'M LIABLE. IT'S THAT SIMPLE.

AND SO I THINK, YES, I WOULD PREFER YOUR HONOR'S SUGGESTION TO REVERSAL WITH INSTRUCTIONS, OF COURSE, REMINDING YOU THAT THERE ARE A NUMBER OF OTHER ISSUES THAT WERE RAISED IN THE THIRD THAT THEY DIDN'T REACH. BUT I THINK THAT THE LEGAL FRAMEWORK MORE FALSE IMPRISONMENT IS ADEQUATE IF THE PLAINTIFF HAD SAID, HAD INCLUDED AN ALLEGATION AND A JURY INSTRUCTION FOR LACK OF GOOD FAITH.

WHO KNOWS?

THE JURY MIGHT HAVE AGREED WITH THEM.

>> WHAT HAPPENS IN A CASE WHERE LAW ENFORCEMENT WALKS IN, POW? THAT'S NOT A FALSE IMPRISONMENT. YOU HAVE PROCURED SOMEBODY COMING IN AND THEY'RE EXECUTED, BUT THAT'S NOT A FALSE IMPRISONMENT.

>> I WOULD AGREE WITH THE COURT

THAT THAT SHOULD BE-- A SIMILAR CLAIM SHOULD EXIST FOR THAT KIND OF--

>> WELL, HOW CAN IT?

I MEAN, IT DOESN'T FIT.

IT DOES NOT FIT ANY OF THE LEGAL ELEMENTS.

>> WELL, I THINK IT COULD, AND I THINK THAT THE CAUSE OF ACTION FOR FALSE IMPRISONMENT COULD BE CONSIDERED CONSTRUED TO INCLUDE THAT KIND OF PHYSICAL VIOLENCE.

>> WELL, YOU KNOW, I

UNDERSTAND--

>> THE IMPRISONMENT IS, I MEAN, THE CONCEPT OF SHOOTING SOMEONE AND IMPRISONMENT SEEMS, SEEMS RATHER RELATED.

I MEAN, IT'S A PHYSICAL DETENTION.

AND IT WOULD SEEM TO ME--

>> OH, I DON'T THINK THERE'S ANY LAW IN FLORIDA AT ALL THAT WOULD SUPPORT THAT.

AND I UNDERSTAND YOU'D RATHER HAVE IT SO THAT YOU ALWAYS WAIVE GOOD FAITH IN THE PRESENCE OF A JURY.

I UNDERSTAND THAT.

>> IT JUST MAY BE WHERE YOU IMPOSE THAT GOOD FAITH.

IS IT IN THE CONTEXT OF THE FALSE IMPRISONMENT CLAIM, OR IS IT IN THE CONTEXT OF SOME OTHER CLAIM THAT THE COURT WOULD ESSENTIALLY ESTABLISH?

ONE WAY OR THE OTHER, I THINK THAT IN THIS CASE, IN THIS CASE THERE WAS A POTENTIAL CLAIM THAT COULD HAVE BEEN MADE FOR FALSE IMPRISONMENT.

THEY COULD HAVE ALLEGED BAD FAITH.

THEY MAY HAVE WON ON IT, BUT THEY DIDN'T INCLUDE THAT JURY INSTRUCTION, AND THEY LOST ON IT.

THEY DIDN'T EVEN PRESERVE THE FAMOUS IMPRISONMENT CLAIM.

THEY NEVER CHALLENGED THE RESULT.

SO HERE IN THIS CASE I THINK WHAT EXISTED WAS POTENTIALLY A FALSE IMPRISONMENT CLAIM.

>> WELL, AGAIN, I UNDERSTAND,

BUT WHERE IN FLORIDA LAW?  
PEKORNEY DOESN'T SAY WE ARE  
ABOLISHING THE TORT OF  
NEGLIGENCE IN CONNECTION WITH  
ANY REPORTING OF CRIMINAL  
CONDUCT.

>> NO.

BUT I THINK BY STATING THAT IN  
THAT CASE-- WHICH I THINK IN  
THE FACTS OF PEKORNEY WE'RE  
DISCUSSING NOW-- YOU'D HAVE  
POTENTIALLY VIABLE.

BUT THE PEKORNEY CASE REJECTED  
ANSWERING THAT FIFTH QUESTION.

>> IT DOESN'T REJECT THE ACTION.

>> RIGHT.

>> YOU KNOW, IT'S UNFORTUNATE  
WHEN WE GET THESE CERTIFIED  
QUESTIONS BECAUSE THERE MAY BE  
MANY REASONS WE DIDN'T ANSWER  
IT.

>> RIGHT.

>> BUT I DON'T REALLY THINK THAT  
ANSWERS THE QUESTION THAT WE ARE  
HERE TALKING ABOUT, IS WHY  
SHOULDN'T A CLAIM FOR NEGLIGENCE  
RISING TO THE LEVEL OF GROSS  
NEGLIGENCE BE THE PROPER CAUSE  
OF ACTION THAT PROTECTS ALL THE  
POLICIES THAT WE'VE ENUMERATED  
WHICH PROTECTS AGAINST AN  
ORDINARY CITIZEN, YOU KNOW,  
ACTING IN, YOU KNOW, WITH GOOD  
FAITH IN REPORTING A CRIME?

>> RIGHT.

BECAUSE YOU HAVE CAUSES OF  
ACTION FOR DEFAMATION,  
THERE'S A CAUSE OF ACTION FOR  
FALSE IMPRISONMENT--

>> BUT THESE AREN'T-- SHE  
DIDN'T-- THE PROBLEM IS SHE  
DIDN'T ACT INTENTIONALLY.

SHE ACTED RECKLESSLY BECAUSE  
THERE WASN'T EVEN ANYTHING THAT  
THIS POOR VICTIM DID TO ENGENDER  
HER BELIEF THAT HE WAS THE BANK  
ROBBER.

SHE RELIED ON SOME PICTURE SHE  
HAD SEEN SOMETIME BACK.

I MEAN, THE IMPLICATIONS OF THAT  
FOR A BANK EMPLOYEE IN THE  
BANK-- WHICH I GUESS IS WHAT  
THEIR EXPERT TALKED ABOUT-- IS  
VERY DIFFERENT THAN, YOU KNOW,  
WHAT WE WOULD THINK ABOUT AS FAR

AS THE POLICY.

I MEAN, OF AN ORDINARY CITIZEN REPORTING A CRIME.

>> YOU KNOW, WELL, GETTING INTO THAT THERE'S A WHOLE OTHER ISSUE LAYERED IN IN THE THIRD DISTRICT COURT OF APPEALS WHICH IS THAT NATIONAL BANKS ARE COMPELLED, ACTUALLY, BY FEDERAL LAW TO REPORT SUSPICIOUS ACTIVITIES AND ARE INSULATED FROM CLAIMS BASED ON THOSE REPORTING--

>> WELL, WHERE-- IS THAT AN ISSUE THAT YOU BROUGHT UP TO THE THIRD DISTRICT?

>> IT IS.

>> AND STILL HAS TO BE RESOLVED?

>> IT IS.

THERE ARE A NUMBER OF ISSUES THAT HAVE TO BE RESOLVED.

>> IT WOULD SEEM TO ME IF THIS WAS PREEMPTED BY FEDERAL LAW, WE OUGHT TO ADDRESS THAT.

IT DOESN'T MATTER WHAT WE THINK, FEDERAL LAW SAYS THERE CAN'T BE A CAUSE OF ACTION.

>> RIGHT.

IT'S BASICALLY UNDER-- IT'S A SUSPICIOUS ACTIVITY REPORT IS UNDER ANTI-MONEY LAUNDERING REGULATIONS.

BUT THE BROAD-- BEARING IN MIND THAT THE REQUIREMENT OF REPORTING IS A VERY UNIQUE FORM OF REPORTING TO A FEDERAL AGENCY CALLED A SUSPICIOUS ACTIVITY REPORT.

BUT THE INSULATION UNDER THE STATUTE IS QUITE BROAD, AND WE BELIEVE OUT APPLIES HERE AND, YES, IT WAS RAISED IN THE THIRD DISTRICT COURT OF APPEALS.

>> WELL, THAT HASN'T BEEN BRIEFED-- IT'S KIND OF LIKE SAYING SOMEONE IN TALLAHASSEE THAT LOOKS SUSPICIOUS WEARING AN FSU HAT, THAT WE CAN CALL THE LAW ON ANYBODY BECAUSE THAT'S ALL THEY WEAR UP HERE.

[LAUGHTER]

>> IN MIAMI THEY USED TO WEAR THE HEAT HATS, BUT NOW THEY DON'T ANYMORE.

[LAUGHTER]

>> THANK YOU.



I'LL GIVE YOU-- OKAY, I'LL GIVE YOU TWO MINUTES.

>> WERE YOU GOING TO GIVE ME MORE?

[LAUGHTER]

>> YOU SAID TWO.

[LAUGHTER]

>> FEDERAL LAW WITH ECONOMIC CRIMES HAS NOTHING TO DO WITH BANK ROBBERIES, AND WE'VE BRIEFED IT, AND IT'S NOT BEFORE THE COURT.

TWO, THERE WAS NO DISTINCTION WHATSOEVER IN THE TRIAL OF THE PUNITIVE DAMAGES BETWEEN THE VARIOUS COUNTS.

I HAVE TO RESPECTFULLY DISAGREE WITH COUNSEL.

THERE WAS NO ATTEMPT--

>> BUT THE INSTRUCTION, YOU WOULD AGREE THE INSTRUCTION SAID THE PUNITIVE DAMAGES ONLY GOES TO THE INTENTIONAL TORT.

>> YES.

THAT'S NUMBER THREE, AND IT WAS SUPERSEDED BY THE VERDICT FORM, WHICH AS YOUR HONOR I BELIEVE PROBED, DID NOT DISTINGUISH BETWEEN ANY OF THESE COUNTS AND ANY CLAIM OF INCONSISTENT VERDICT WAS SIMPLY WAIVED.

THEY-- IT WAS ACTUALLY VENTILATED AND THEN EXPLICITLY WAIVED, AND I THINK AS YOUR HONOR SUGGESTED, WE GET THE BENEFIT OF THAT.

AND FINALLY, QUESTION FIVE THAT WAS CERTIFIED SAID IS THERE A REASONABLENESS FACTOR IN THE TORT OF PROCURING AN ARREST.

THAT WAS QUESTION FIVE.

HAD NOTHING TO DO WITH THE ISSUE OF NEGLIGENCE SHORT OF PROCURING ARREST, AND YOUR HONOR POINTED OUT THIS COURT NEVER EVEN ADDRESSED IT.

AND SO IT SEEMS TO ME THAT EVEN IF EVERYTHING THAT'S BEING SUGGESTED HERE IS RIGHT, IT WAS WAIVED.

THE INSTRUCTION THAT WAS PROPOSED WAS NOT VALID.

IT PRESUMED THE RESULT.

SO EVEN IF THERE IS A GOOD FAITH DEFENSE, IT'S NOT PRESENTED

HERE.

THE PUNITIVE FINDING  
RESPECTFULLY-- CERTAINLY  
RELEVANT TO THE CORPORATE LEVEL  
CONDUCT-- IS ANALOGOUS IN ANY  
EVENT, AND THERE OUGHT TO BE A  
CAUSE OF ACTION FOR NEGLIGENCE  
EVEN IF SUBJECT TO THE GOOD  
FAITH DEFENSE OR WE HAVE TO, AS  
YOUR HONOR SUGGESTED, NEGATE  
THAT DEFENSE.

AND, THEREFORE RESPECTFULLY, THE  
DECISION OF THE DISTRICT COURT  
SHOULD BE DISAPPROVED.

>> THANK YOU, COUNSEL, FOR YOUR  
ARGUMENTS.

COURT'S IN RECESS UNTIL TOMORROW  
AT 9:30.

>> ALL RISE.